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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 371

GAYNOR NEWS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals (R. 121-128) is reported at 197 F. 2d 719. The findings of fact, conclusions of law, and order of the Board (R. 9-57) are reported at 93 NLRB 299.

JURISDICTION

The decree of the Court of Appeals was entered on July 8, 1952 (R. 129-132). The petition for a writ of certiorari was filed on October 2, 1952, and was granted on March 9, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Under Section 8 (a) (3) of the National Labor Relations Act it is unlawful for an employer

"by discrimination in regard to * * * any term or condition of employment to encourage * * * membership in any labor organization." The primary question presented is whether an employer who grants a retroactive wage increase and vacation payments to employees who are union members and withholds such benefits from other employees because they are non-members violates Section 8 (a) (3) in the absence of independent proof that his action was intended to, or did in fact, encourage union membership.

2. Whether, upon a timely charge filed by a single employee alleging that as a non-member of a union he was denied benefits granted union members only, the Board's General Counsel may, under Section 10 (b) of the Act, properly include in a complaint an allegation that the employer had discriminated against not only the charging employee, but also against all others similarly situated, even though no new charge had been filed with respect to these other employees.[1]

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[1] The third question presented in petitioner's brief (p. 3) was not presented in the petition for certiorari and is, therefore, not properly before this Court. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177-178, 179; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182. Moreover, the question is moot inasmuch as the contract affected has expired. (G. C. Exh. 2, par. 19 (a), R. 57-58). This observation also applies to the discussion of the question in the brief of Newspaper and Mail Deliverers' Union, as amicus curiae (pp. 5-6). The Union's additional contention (Br. 5), that the decree of the court below is erroneous insofar as it enjoins petitioner

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, before amendment (49 Stat. 449, 29 U. S. C. 151 *et seq.*) and after amendment (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are set forth in the Appendix, *infra,* pp. 57-61.

STATEMENT

A. The Board's findings and conclusions

The Board held that petitioner had violated Section 8 (a) (1), (2), and (3) of the Act by refusing to accord to its non-union employees certain benefits which it granted to its union employees, and by executing and maintaining an agreement which contained an illegal union-security clause. The essential facts upon which the Board's conclusions rest are not in dispute (R. 79-80, 82), and may be summarized as follows:

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from "Entering into, renewing, or enforcing any agreement with [the Union], * * * which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended" (R. 130), also does not come within the scope of the questions as to which this Court granted certiorari. Moreover, the provision in question is valid. Having found that petitioner had been party to a contract containing a union-security clause not authorized by Section 8 (a) (3) of the amended Act, the Board properly guarded against future unauthorized union-security agreements. The order does no more than require petitioner to observe in the future the statutory requirements with respect to union-security agreements. Cf. *National Labor Relations Board* v. *Andrew Jergens Co.,* 175 F. 2d 130, 134 (C. A. 9), certiorari denied, 338 U. S. 827.

1. *Petitioner's discriminatory treatment of its non-union employees*

Petitioner and the Union [2] have had collective bargaining agreements covering delivery department employees [3] since 1943 (R. 21). On January 2, 1946, petitioner and the Union executed a collective bargaining contract which embraced members of the Union who were then or would thereafter be employed by petitioner (R. 21; 97). Under the contract petitioner was required to employ only members of the Union (R. 97); the Union, in turn, ordinarily admitted to membership only the first-born sons of persons who were already members (but see p. 39, *infra.*) The contract, however, also permitted employment of non-union personnel if the Union could not supply labor from its own ranks (R. 98), and petitioner did hire persons who were not union members and who did not thereafter become union members (R. 64). This agreement also provided for specified wages and paid vacations based on the number of days worked during the previous year (R. 98-99). The original termination date of the contract, October 16, 1947, was extended by a supplementary agreement dated August 22, 1946, for a period of one year, to October 16, 1948 (R. 95-96).

On October 9, 1947, petitioner and the Union executed a second supplementary agreement which

[2] Newspaper and Mail Deliverers' Union of New York and Vicinity.

[3] These are the only employees involved in this proceeding.

provided that in the event the parties negotiated a new contract, the wage rates set therein would be applicable retroactively for three months in lieu of the wages provided in the old contract (R. 101-102). On October 25, 1948, petitioner and the Union entered into a new agreement, effective that day, which provided for increased wage and vacation benefits (R. 91-94).

As provided in the supplementary agreement of October 9, 1947, petitioner was obligated to apply the wage increase of the new agreement retroactively through the last three months of the old agreement. In November, 1948, petitioner paid *to its union employees only* a sum of money constituting the difference between the old and the newly increased wage rates for the three months' period. It failed and refused to pay the same differential to any of its non-union employees (R. 8-9, 23; 79, 82, 64-68).

In addition, petitioner awarded retroactively, to union employees only, the increased vacation benefits provided in the contract of October 25, 1948; it failed and refused to make similar payments to any of the non-union employees (R. 8-9, 23-24; 80, 82). This action was taken despite the fact that none of the contracts provided for retroactive application of the new vacation benefits (R. 26; 61-62).

Upon these facts the Board concluded that petitioner, by making retroactive wage and vacation

benefit payments to union employees because of their membership in the Union while failing and refusing to make such payments to non-union employees because they were not members, discriminated in regard to the terms and conditions of employment of the non-union employees so as to encourage membership in the Union, thereby violating Section 8 (a) (3) and (1) of the Act. The Board concluded further that petitioner, by according union employees preferred treatment, illegally assisted and supported the Union in violation of Section 8 (a) (2) of the Act (R. 29, 8-9).

2. *The illegal union-security clause in the October 25, 1948 contract*

The October 25, 1948, contract contained a union-security clause which required all new employees hired by petitioner to become members of the Union thirty days following the beginning of their employment (R. 92).[4] The Union had never been authorized in a Board-conducted election pursuant to Sections 9 (e) and 8 (a) (3) of the Act to negotiate a union-security agreement.[5] The Board found on these facts that by entering into an agreement with the Union on October 25, 1948, which contained an unauthorized union-security provision, and by continuing this contract in effect, petitioner

[4] This contract was in effect at the time of the hearing in July 1950 (R. 55).

[5] During all times pertinent herein, Sections 8 (a) (3) and 9 (e) of the Act provided that union-security agreements could legally be executed only by unions which had been authorized to do so pursuant to a Board-conducted election.

had interfered with its employees' right to refrain from union activities, in violation of Section 8 (a) (1). The Board found further that by executing the illegal union-security agreement petitioner had lent its assistance and support to the Union in recruiting and maintaining its membership, in violation of Section 8 (a) (2) of the Act (R. 30-35, 8 n. 4).

3. *The validity of the complaint issued by the General Counsel*

The original charge initiating these proceedings was filed on February 1, 1949, by Sheldon Loner, one of the non-union employees, and served on petitioner on February 3, 1949 (R. 74-75, 78, 82). It alleged that petitioner, in violation of Section 8 (a) (1) and (3), had discriminated against Loner by refusing to make his October 1948 wage increase retroactive and by refusing to pay him vacation benefits because of his non-membership in the Union (R. 74-75). An amended charge filed by Loner on June 13, 1950, repeated those allegations and also alleged that petitioner had violated Section 8 (a) (1) and (2) by executing the October 25, 1948, contract containing an illegal union-security clause (R. 76-77). The General Counsel's complaint, issued on June 13, 1950, repeated the allegations in the amended charge and added the allegation that petitioner had refused to make the retroactive wage and vacation payments not only to Loner but to all employees similarly situated

(R. 79-80). The Board rejected petitioner's contention that under the six-month period of limitations contained in Section 10 (b) of the Act the complaint could properly include only the violations alleged in the original charge. Relying on its holding in *Cathey Lumber Co.* 86 NLRB 157, 162-163,[6] the Board held "that a complaint may lawfully enlarge upon a charge if such additional unfair labor practices were committed no longer than 6 months prior to the filing and service of such charge" (R. 19-20).

B. The Board's order

The Board's order (R. 9-12), as enforced by the court below, prohibits petitioner from encouraging membership in any union by discriminating in regard to hire, tenure, terms and conditions of employment. The order also requires petitioner to stop performing or giving effect to its contract of October 25, 1948, with the Union and to refrain from executing or enforcing any agreement with the Union which contains a union-security clause unless such agreement has been authorized as provided by the Act.

Affirmatively, the order requires petitioner to reimburse the non-union employees for any loss of pay which they suffered because of petitioner's discrimination, and to post notices, in the usual

[6] Enforced, 185 F. 2d 1021 (C. A. 5), vacated on other grounds, 189 F. 2d 428.

form, stating that it will comply with the Board's order.[7]

C. The decision of the court below

Except for the modification noted (n. 7, this page), the court below enforced the order of the Board (R. 128-130).

1. *The validity of the complaint.* Noting that the complaint expanded upon the charge to include all non-union employees discriminated against, the court observed (R. 122-123):

> We feel that the enlarged complaint can be justified here on the "relating back" theory in so far as the additional victims of the discriminatory treatment are concerned. Here the violation and the facts constituting it remained the same as in the original charge; only the number of those discriminated against was altered. This addition certainly could not prejudice the employer's preparation of his case or mislead him as to what exactly he was being charged with.

The court further stated that the allegation in the complaint that the discrimination, characterized in the charge as a violation of Section 8 (a) (1) and (3), also violated Section 8 (a) (2), "was only a

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[7] The order originally entered by the Board also required petitioner to refrain from recognizing the Union until the Union had been certified by the Board as representative of the employees (R. 10). This portion of the order was set aside by the court below, one judge dissenting (R. 127-128), and the Board has not sought review of this aspect of the case.

change in legal theory and not in the nature of the offense charged" (R. 123). With respect to the union-security contract, the court held that since the contract was still in force at the time of the amended charge alleging its illegality, "the six months' limitation period of Section 10 (b) had not even begun to operate" (*ibid.*).

2. *The merits.* The granting of benefits to union members and the withholding of benefits from non-members, the court held, was "discriminatory conduct * * * inherently conducive to increased union membership" in that it increased "the number of workers who would like to join and/or their quantum of desire" (R. 124). Rejecting petitioner's contention that the non-union employees, who were ineligible for membership under the Union's rules, had already tried to join the Union and hence were not "encouraged" to do so by the discrimination against them, the court held that "these rejected applicants have been and will continue to be 'encouraged' by the discriminatory benefits in their desire for membership * * *. If and when the barriers are let down, among the new and successful applicants will almost surely be large groups of workers previously 'encouraged' by the employer's illegal discrimination" (R. 124-125). The court noted that here, unlike *National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), the Union "represented the majority of employees and was the exclusive bargain-

ing agent for the plant" so that it could not legally bargain "for special benefits to union members only" (R. 123-124).

The court also agreed with the Board that the union-security contract was invalid because it had not been authorized by the special election then required by the Act (R. 126). Petitioner did not seek review of this aspect of the case in its petition for a writ of certiorari.[8]

SUMMARY OF ARGUMENT

I

A. By making membership in the Union the basis for awarding retroactive wage and vacation pay, petitioner committed an act of "discrimination" which "encouraged" membership within the meaning of Section 8 (a) (3). Petitioner's contention that its conduct was not "discriminatory" because the payments were made pursuant to contract with the Union furnishes no defense. The Act does not permit, in the circumstances of this case, a contractual arrangement obligating the employer to make wage payments to union members but leaving the employer free to withhold wage payments from similarly situated nonmembers. The Union represented a majority of the employees and was the exclusive bargaining agent of all the employees. As such, the Union was obligated under the Act to bargain evenhandedly for both

[8] See, n. 1, *supra*, p. 2

members and nonmembers and could not validly contract for special benefits for its members that would not be extended to the nonmembers. "No more is [petitioner] bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making." *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 203-204.

B. The fact that petitioner may not have intended to encourage membership in the Union by its disparate treatment of members and nonmembers is not material. Once it appears, as it does here, that the employer has discriminated against nonmembers because of their nonmembership, a violation of Section 8 (a) (3) is established and the employer's purpose in so discriminating is immaterial. *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 805. The employer is not excused from the consequences of unlawful conduct because he may have yielded to the economic power of the Union. This is so because the statutory safeguards vouchsafed employees are as much abridged whether the discrimination results from economic pressures on the employer or from his deliberate intent to favor a particular union or its members.

C. Contrary to petitioner's contention, the Board need not show, to establish a violation of Section 8 (a) (3), that particular employees were actually encouraged to join the Union. It is

enough that from the character of the discrimination it may reasonably be inferred that it tends to encourage membership. The actual reaction of the employees need not be demonstrated. This Court has recognized that the testimony of employees as to whether they were or were not affected by the conduct constituting an unfair labor practice is of little probative value. The test for determining whether discriminatory treatment violated the Act cannot be made to depend upon the particular temperaments of the particular employees discriminated against.

The disparate treatment accorded to the nonmembers by petitioner, realistically viewed, gives rise to a fair inference that nonmembers will be encouraged to acquire membership in the Union. The fact that the employees in this case may have already desired to join the Union, and were barred by its membership rules, does not take this case outside the general rule that proof of "encouragement" of specific employees is not required. The desire of these employees to surmount the obstacle to their becoming members would inevitably be increased by the discrimination. Moreover, the discrimination in favor of members would also encourage the employees now in the Union to retain their union membership and encourage employees in the industry, otherwise eligible, to join the Union.

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The General Counsel's complaint properly alleged that petitioner's discriminatory wage and vacation payments violated the Act with respect to all non-union employees. The fact that the charge, filed by one of the non-union employees, alleged discrimination only as to him did not preclude the General Counsel from including in the complaint the other employees discriminated against. The power of the Board thus to expand upon a charge was well-settled under the Wagner Act; it was then recognized that the charge merely served to set in motion the Board's investigatory machinery. Any other result would have curtailed the Board's power to vindicate the public interest in the redress of unfair labor practices. The Taft-Hartley amendments did not alter the function of a charge and did not affect the General Counsel's investigatory powers or his right to amend the complaint at any time. The new requirement that charges be filed within six months of the unfair labor practice did not limit the General Counsel's or the Board's power to deal with unfair labor practices committed within that period. Furthermore, in the instant case, the discriminatory conduct alleged in the charge is the same as that alleged in the complaint; the sole variance is in the number of employees affected by the single unlawful act. Every purpose of a statute of limitations is served, and petitioner suffers no hardship, surprise, or other

prejudice, by the inclusion in the complaint of all the employees discriminated against by the unlawful act alleged in the charge.

ARGUMENT

I

By making membership or nonmembership in the Union the basis for determining whether an employee would receive additional compensation, petitioner violated Section 8 (a) (3) of the Act which forbids an employer "by discrimination in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization"

The Senate Committee on Education and Labor, reporting out an early version of the Wagner Act which contained a ban on discrimination almost identical with Section 8 (a) (3) of the present National Labor Relations Act,[9] stated that under the proposed legislation no employer is "free to pay a man a higher or lower wage solely because of his membership or non-membership in a labor organization." S. Rep. No. 1184, 73rd Cong., 2nd Sess., p. 6. The same principle, we submit, governs this case.

Petitioner admittedly granted a retroactive wage increase and vacation pay to all the union members among its employees, admittedly withheld these

[9] Section 3 (4) of that bill provided that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment, or by contract or agreement, to encourage or discourage membership in any labor organization." S. 2926, 2nd Senate Print, 73rd Cong., 2nd Sess.

benefits from all the nonmembers among its employees, and admittedly made union membership the sole factor in determining which employees would receive the benefits in question (R. 63-64, 67-68). Upon these facts the Board and the court below held that petitioner had violated Section 8 (a) (3) of the Act which forbids an employer—

> by discrimination in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization: * * *

Petitioner contends, however, that it did not "discriminate" against non-union employees, and that even if it did, such discrimination was not unlawful in the absence of a showing that the discrimination was intended to, and did in fact, encourage union membership. We show below (A) that petitioner's treatment of nonmembers constituted "discrimination," (B) that petitioner's motive in discriminating against its non-union employees is irrelevant, and (C) that since the discrimination necessarily tended to encourage union membership, specific evidence that any particular individual was encouraged to seek or to retain union membership is not required to establish a violation of Section 8 (a) (3).

A. *By making retroactive wage and vacation payments to union members only, petitioner engaged in "discrimination" within the meaning of Section 8 (a) (3)*

The adoption by an employer of union membership as a standard of compensation, paying higher wages to union members and lower wages to nonmembers, is "discrimination in regard to * * * [a] term or condition of employment" in the clearest literal sense of these words.[10] Petitioner contends (Br. 5) that its payment of retroactive wages to union members was in fulfillment of its contract with the Union; that this contract did not require that the nonmembers be similarly compensated; and that "since it was not contractually bound to pay extra benefits to its relatively temporary non-Union employees,[11] in its business judgment, it did

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[10] Webster's *New International Dictionary*, 2nd Edition, defines "discrimination" as meaning, *inter alia*, "A distinction, as in treatment * * * Specif., * * * a difference in treatment made between persons * * * in respect of substantially the same service." See also, *Montgomery Ward & Co.* v. *National Labor Relations Board*, 107 F. 2d 555, 563-564 (C. A. 7).

[11] To distinguish between union members and nonmembers petitioner sometimes refers to them, respectively, as "permanent personnel" and "temporary personnel" (*e.g.*, Br. 5, 16). To describe the nonmembers as "temporary" is singular in view of the fact that the only evidence in the record of actual length of service showed that the particular nonmember had been in petitioner's employ for about a year and a half (R. 69 ~~82, 85~~), a degree of tenure which in common understanding would seem to rate as more than temporary. The fact is that retroactive wage and vacation benefits were withheld from the non-members, not because of any relevant difference in their

not do so." But this explanation states no reason why the ensuing disparity is not the precise "discrimination in regard to * * * any term or condition of employment" contemplated by the statute. Therefore, unless the statute privileges a contractual arrangement obligating the employer to make wage payments to union members but leaving the employer free to withhold such wage payments from similarly situated nonmembers,[12] the contract is irrelevant. And we think it clear that the statute does not privilege such an arrangement in the circumstances of this case.

As the court below observed (R. 124), the "union here represented the majority of employees and was the exclusive bargaining agent for the plant." [13] By virtue of the Union's status, the non-

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length of service in comparison with the union members, but only because they were not in the Union (R. 61-68): In other words, except for their nonmembership status, the nonmembers qualified for the retroactive benefits paid the union members.

[12] The Board found that the contract did not prevent petitioner from paying retroactive wages to nonmembers if it so chose (R. 9, 26). If petitioner contends that the contract *required* it to limit payments to union members, the fallacy of its defense is compounded for the reasons we state below.

[13] Petitioner does not contest that this was the status of the Union. At the hearing before the examiner, petitioner stated in argument that "It [the Union] is the union which is the exclusive bargaining agent for all of the newspapers in the Metropolitan area, of which we are one. It has the complete control of that industry, from the viewpoint of labor. It represents a monopoly in that field" (Tr. 336). In its brief, petitioner states (pp. 8-9) that it has "a long bargaining history"

members nc longer had the power to bargain on their own behalf but were required to adhere to the terms of employment contracted for by the Union. *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332; *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342. The preemptive power acquired by the Union carried the corresponding duty to represent all the employees in the unit, "regardless of their union affiliations or want of them"; the Union is "to secure" for all, it is "to deprive" none, of the "benefits of collective bargaining"; and in representing all, "the majority as well as the minority," it is "to act for and not against those whom it represents." *Steele*

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with the Union "of whose representative status there has never been any question", and (p. 3) that "in 1946," it "concluded a valid closed shop agreement" with the Union. Since under both Section 8(3) of the original Act and Section 8(a)(3) of the amended Act, a *valid* union security agreement may be entered into only with an exclusive bargaining representative, petitioner was necessarily representing that this was the Union's status.

As the court below pointed out (R. 123-124), it is the Union's exclusive representative status in this case which decisively distinguishes *National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.,* 187 F. 2d 547, where the Third Circuit found that the union represented a minority of the employees and contracted on behalf of its members only; for this reason, the Third Circuit continued, the employer could withhold from nonmembers the advantages secured by the minority union for its members. Since the record of this case does not present this question, we pretermit discussion of it, except to note the Board's disagreement with the Third Circuit. *Rockaway News Supply Co., Inc.,* 94 NLRB 1056, 1058-1059.

v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 200-202; see also, *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248, 255; *Ford Motor Co.* v. *Huffman*, Nos. 193 and 194 this Term, slip op. 7-8. In a footnote to the latter statement in *Steele* (323 U. S., at 202, n. 3), this Court added, summarizing the essence of H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20-22, that "under the N.L.R.A., the employer was required to give 'equally advantageous terms to nonmembers of the labor organization negotiating the agreement.' See also the Senate Committee Report on the N.L.R.A. to the same effect. S. Rep. No. 573, 74th Cong., 1st Sess., p. 13." The Senate Report at the cited page stated that "the representatives selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority." Similarly, Senator Wagner during the debate on the bill stated (79 Cong. Rec. 7673):

> Under this proposed legislation, assuming an agreement has been consummated by the agency elected by the majority of the employees, there will be no advantage which a majority can have under an agreement to which the minority is not also entitled, and in order to have that advantage the minority need not join any organization. It can join or not join, either way. It cannot be discriminated against under any other provision of the law.

Petitioner states (Br. 3) that, "as with every closed shop contract," its closed shop contract with the Union "was applicable to Union members only." Petitioner's assumption that a union having a closed shop contract is not obligated to bargain evenhandedly for any nonmembers in the unit is inaccurate. Under both Section 8(3) of the original Act and Section 8(a)(3) of the amended Act, as a condition precedent to negotiating a closed shop agreement (and the lesser form of union-security agreement permitted by the amended Act), the union must first qualify as an exclusive representative. That exclusive status at once places on the union the duty of impartial representation. Nothing in the Act justifies an assumption that, in negotiating for a closed shop, a union may in fact bargain itself out of its statutory duty of fulfilling its obligation to represent fairly all the employees in the unit. Indeed, in *Wallace Corp.* v. *National Labor Relations Board,* 323 U. S. 248, 255, it was in reference to a union having a closed shop contract that this Court stated: "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union

at the time it is chosen by the majority would be left without adequate representation."

It is therefore clear, as the court below held (R. 124), that the Union "could not betray the trust of non-union members, by bargaining for special benefits to union-members only, thus leaving the non-union members with no means of equalizing the situation." In relying on the contract to justify its preferential treatment of union members, petitioner is in effect contending that the Union's default in performing its obligation of evenhanded representation takes the disparity out of the statutory class of "discrimination in regard to * * * any term or condition of employment." But that default emphasizes rather than minimizes the discrimination practiced. Petitioner is not "entitled to take the benefit of a contract which the bargaining representative is prohibited by statute from making." *Steele* case, *supra,* at 203-204.

Petitioner's position is in fact more broadly based than reliance on the contract alone. In addition to making retroactive wage payments to union members, as required by the contract, petitioner paid retroactive vacation benefits to union members, though not required to do so by the contract, while withholding such vacation benefits from non-members (R. 25-26; 61-62, 63-64; 78-79, 81-82). To justify this disparity, petitioner states that, "in granting such a gratuitous benefit, the employer weighed the cost in terms of maintaining harmon-

ious labor relations with its permanent personnel."[14] (Pet. 3; see also *id.*, p. 14, n. 3; cf. Br. 17, n. 7). At the hearing before the examiner petitioner stated less guardedly that vacation benefits were paid union members at least in part in order "to maintain peace with the union" (R. 61). Realistically, therefore, petitioner means simply that it was concerned with maintaining harmony with the union members, who had the backing of organizational strength behind them, but that it was indifferent to the nonmembers, who did not enjoy organizational support. "The Labor Relations Act was designed to wipe out such discrimination in industrial relations." *Wallace Corp.* v. *National Labor Relations Board,* 323 U. S. 248, 256.

It is clear, in sum, that by granting retroactive wage and vacation payments to union members and withholding them from nonmembers, petitioner engaged in "discrimination in regard to * * * any term or condition of employment" within the meaning of Section 8(a)(3). We turn to consider whether by this discrimination petitioner "encouraged" union membership.

[14] See n. 11, p. 17, *supra.*

B. *Petitioner's motive in discriminating among its employees on the basis of union membership is immaterial to the question whether the discrimination encouraged union membership in violation of Section 8(a)(3)*

In commenting on the reach of Section 8(3) of the original Act, now Section 8(a)(3) of the amended Act, the House Report stated that "agreements more favorable to the majority than to the minority are impossible, for under section 8(3) any discrimination is outlawed which tends to 'encourage or discourage membership in any labor organization.'" H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. That is this case.

Petitioner nevertheless urges (Br. 5, 6, 21-22, 24-29) that, even if the union-encouraging tendency exists, which it disputes (see *infra,* pp. 33-41), the discrimination practiced is not outlawed because, as it asserts, petitioner had no motive, purpose or desire to encourage membership in the Union; that on the contrary it was opposed to the Union; that it would suffer financial loss by an increase in the Union's membership; and that consequently it did not "encourage" membership in the Union within the meaning of Section 8(a)(3). But the statute does not make the employer's motive in this sense the test of whether his conduct in discriminating is unlawful.

The heart of petitioner's position is that Section 8(a)(3) condemns only such union-discouraging conduct as flows from an employer's anti-union

animus and, conversely, only such union-encouraging conduct as stems from his pro-union bias.[15] This notion was rejected by this Court in *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, which controls here. In *Republic Aviation,* the employer adopted a rule against any solicitation on its premises and, "without any animus against unions, general or particular," [16]

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[15] In support of its position petitioner relies on some general observations by Prof. C. C. Ward in *Discrimination under the National Labor Relations Act* (1939), 48 Yale L. J. 1152. Petitioner's reliance upon these observations, if not misplaced, is at best dubious. In the same article Prof. Ward, posing substantially the case here, reaches the same result as did the Board and the court below. "To illustrate," writes Prof. Ward (at p. 1166), "if a majority union by reason of its superior economic power and favored position under the Act, has overcome an employer's resistance to any type of contract other than one containing a closed shop clause, and has secured an agreement requiring, for members only, wage increases, minimum guaranties, or vacations, is it an unfair labor practice for the employer to fail to grant similar concessions to non-union employees, even though the contract purports to restrict them to union members? Obviously the answer is yes. • • • In such a situation, although the Board has never mentioned it, the non-union employees are clearly entitled to file charges of violation of Section 8 (3), and the Board, to maintain a consistent position with its remedies in discouragement cases, would have to order differential back pay if union members had been receiving higher wages for the same work." In the instant case the contract did not even purport to restrict the retroactive payment of wages and vacation benefits to union members; petitioner on its own initiative concluded to restrict these payments to union members.

[16] The quoted statement is from the Second Circuit's decision affirmed by this Court in *Republic Aviation.* 142 F. 2d 193, 195.

enforced the rule impartially against solicitation of union membership within the plant during non-working time. After warning, an employee persisted in violating the rule by soliciting union membership during his lunch period, and for this infraction he was discharged "without discrimination on the part of the employer toward union activity" (324 U. S. at 795). The employer contended that, whether or not the no-solicitation rule was itself invalid, the discharge for its infraction did not violate Section 8(3), for "the discharge resulted from the impartial enforcement of the rule, and was not in any way motivated by *anti-union cause.*" Petitioner's Brief, p. 27, No. 226, October Term, 1944 (emphasis supplied). Holding the rule invalid, this Court rejected the employer's defense, explaining that (324 U. S. at 805):

> * * * petitioner urges that irrespective of the validity of the rule against solicitation, its application in this instance did not violate § 8(3), * * * because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors. It seems clear, however, that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of § 8(3) in that it discourages membership in a labor organization.

Thus this Court held that the discharge, not privileged by a valid reason, offended Section 8(3) "in that it discourages membership," and it did not matter that the discouragement was not the result of an anti-union purpose but was in fact innocent of any such motive. So in this case, the disparate treatment accorded the nonmembers, not privileged by the statute (*supra,* pp. 17-23), and having a union-encouraging tendency (*infra,* pp. 33-41), violated Section 8(a)(3) even if the encouragement was unintended.

From the earliest days of the Act it has been contended, precisely as petitioner contends here, that acts of discrimination in favor of members of a particular union were not unlawful because they did not spring from any purpose to encourage membership but were compelled by the union's economic power over the employer. Without exception these contentions have been rejected by the courts, which have held that the employer's lack of intention to encourage union membership was no defense to his conduct in actually so doing. As the courts have recognized, to hold that an employer may engage in discriminatory conduct, or commit other unfair labor practices, with impunity, provided only that he had no "intent" to violate the Act, would go far to nullify the protection which the statute extends to employees. This is so because the statutory safeguards vouchsafed employees are as much abridged whether the discrimi-

nation results from economic pressures on the employer or from his deliberate intent to favor a particular union. See, *e.g., National Labor Relations Board* v. *Hudson Motor Car Co.,* 128 F. 2d 528, 532-533 (C. A. 6); *National Labor Relations Board* v. *Gluek Brewing Co.,* 144 F. 2d 847, 853-854 (C. A. 8), and cases there cited; *National Labor Relations Board* v. *Fry Roofing Co.,* 193 F. 2d 324, 327 (C. A. 9); *National Labor Relations Board* v. *Don Juan Co.,* 185 F. 2d 393 (C. A. 2). As stated by the Sixth Circuit in *Hudson Motor Car, supra:*

> We think it right and just to say that so far as the record shows, [the employer] has not wilfully violated the provisions of the Act, but the intent of the employer is not within the ambit of our power of review. When it is once made to appear from the primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives.

Section 8(a)(3), like its companion Sections 8(a)(1), 8(a)(2) and 8(a)(5), is concerned with the effect of employer conduct upon employees rather than with the employer's motive in undertaking the proscribed conduct. Section 8(a)(3) makes it an unfair labor practice "by discrimination * * * to encourage or discourage membership," Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce," Section 8(a)(2) makes it an unfair labor practice "to dominate [or support] * * * any labor organization,"

and Section 8(a)(5) makes it an unfair labor practice "to refuse to bargain." In construing all of these sections the courts have agreed that proof of the employer's motive is not an essential element of the offense. Thus, the courts have held that "the test of interference, restraint and coercion under Section 8(1) of the Act does not turn on the employer's motive * * *" (*National Labor Relations Board* v. *Illinois Tool Works,* 153 F. 2d 811, 814 (C. A. 7)); that "the test, whether a challenged organization is employer controlled is not an objective one, but rather subjective, from the standpoint of employees" (*National Labor Relations Board* v. *Thompson Products, Inc.,* 130 F. 2d 363, 368 (C. A. 6)); and that a refusal to bargain "cannot be excused because of economic pressure exerted against the employer by one of the unions engaged in a jurisdictional labor dispute" (*National Labor Relations Board* v. *National Broadcasting Co.,* 150 F. 2d 895, 900 (C. A. 2)). In short, "whatever purpose an employer may have in demoting or otherwise adversely affecting the employment status of his employees who engage in lawful union activity, so long as that action would not have been taken in the absence of such union activity, the employer thereby necessarily discourages membership in the labor organization * * *." *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board,* 162 F. 2d 435, 440 (C. A. 7).[17]

[17] In the cited case the Seventh Circuit went on to say: "Moreover, an employer may not discriminate against an

In sum, where, as here, the sole distinguishing factor resulting in the discriminatory treatment of certain employees is their union membership, or want thereof, the employer's underlying purpose in thus discriminating is irrelevant in determining whether he has violated the Act. Petitioner points out (Br. 23) that both the Board and the courts have had occasion to inquire whether dis-

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employee because of his membership or activity in a union even though the employer believes that he has good business reasons to justify his discrimination." The Seventh Circuit thus affirmed the position taken by the Board in the decision under review, namely (70 NLRB 348, 349-350):

> The purpose of the Act is to protect employees in their right to self-organization, to protect employees from conduct by employers which, experience indicates, has a tendency to thwart self-organization. One of the most powerful forms of intimidation is to penalize employees because of their membership in or their activities in behalf of a union. To protect employees against this form of intimidation, Congress specifically made it unlawful for an employer "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Radically to alter the job content of a position and to reduce the pay *concededly because* employees have selected a particular union as collective bargaining agent is to practice the clearest variety of discrimination banned by the Act. Such discrimination normally and naturally tends to discourage membership in a labor organization and is therefore an unfair labor practice. Here, to be sure, respondent was seeking to deal with what it considered, or anticipated to be, a management problem. But it is not determinative that the respondent may not primarily have intended to discourage membership in the Union. The vice in the respondent's action rests on the fact of discrimination.

crimination had "both the *purpose* and effect" of encouraging union membership before ruling that the discrimination violated Section 8(a)(3). From this petitioner mistakenly concludes that the Board in the present case overlooked an essential element of the offense in failing to take into account petitioner's lack of a union-encouraging motive. It is clear, however, that inquiry into the employer's purpose or motive is material only when the ultimate fact, admitted here, is contested—*i.e.*, only when it is disputed whether union affiliation or lack of it prompted the discrimination. Because an employer may discriminate for any reason other than union or concerted activities, the employer's motive becomes a critical ancillary issue whenever he contends that his conduct was motivated by factors other than union activity. In such cases, because "motive is a persuasive interpreter of equivocal conduct" (*Texas & N. O. R. Co.* v. *Brotherhood of Ry. Clerks,* 281 U. S. 548, 559), proof of the employer's motive is necessary to ascertain the real cause of the discrimination—whether for union activity or for some other reason. In the instant case, the fact ordinarily contested is established—petitioner withheld benefits from certain employees solely and precisely because they were not union members—and, as we have shown (*supra,* pp. 24-29), petitioner's purpose is so discriminating is immaterial.

There is, then, no inconsistency whatever be-

tween the cases where inquiry has been directed to "both the purpose and effect" of discrimination—a phrase, incidentally, which originated with the Board (see note 18, this page)—and cases, like the present one, where the admitted fact of discrimination based on union membership or nonmembership makes such inquiry irrelevant.[18] Like the Board, the same courts and judges who have found it necessary to consider the "purpose and effect" of discrimination have repeatedly ruled that this

[18] The phrase invoked by petitioner was given its main judicial impetus by *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586, 592 (C. A. 2), where Judge Frank writing for the Second Circuit, taking the language from the Board's decision (20 NLRB 356, 375), stated that "Section 8(3) requires that the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership." Judge Frank later explained in *National Labor Relations Board* v. *Cities Service Oil Company*, 129 F. 2d 933, 937 (C. A. 2), as he had already explained in *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d 208, 222, n. 51 (C. A. 2), that all the decision in *Air Associates* meant to convey was that there was no reasonable basis in the evidence for inferring that the discharges in question had a union-discouraging tendency. And it was Judge Frank who wrote for the Second Circuit in the present case without suggesting any change in view from what he had written before. Compare also the Ninth Circuit's decision in *National Labor Relations Board* v. *Wells, Inc.*, 162 F. 2d 457, 459-460, cited by petitioner, with its previous decision in *National Labor Relations Board* v. *Walt Disney Productions*, 146 F. 2d 44, 49, certiorari denied, 324 U. S. 877, in which two of the three judges were the same in both cases. And compare the Seventh Circuit's decision in *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435, 440, with its previous decision in *National Labor Relations Board* v. *Western Cartridge Co.*, 139 F. 2d 855, 858, cited by petitioner, in which all three judges were the same in both cases.

consideration is to be dispensed with where the crucial fact of union encouragement or discouragement is otherwise established.[19]

C. *The Board and the court below correctly found that petitioner's discrimination encouraged union membership notwithstanding the absence of testimony that any given person was encouraged to seek or to retain such membership*

Petitioner further contends that, in granting retroactive wage and vacation benefits to union members while denying them to nonmembers, its discrimination did not have the effect of encouraging membership in the Union.

At pages 37-43 of the Board's brief in *National Labor Relations Board* v. *International Brotherhood of Teamsters,* No. 301, this Term, we have shown that (1) discrimination is forbidden by Section 8 (a) (3) if it has a tendency to encourage or discourage union membership, and (2) the tendency is sufficiently established if its existence may reasonably be inferred from the character of the discrimination. The discrimination in this case meets these standards.

It seems obvious that ordinarily, as the House Report put it, "If the employer should fail to give

[19] Petitioner, although still denying that it intended to encourage membership in the Union, is not seeking review here of the Board's holding, approved by the court below, that petitioner unlawfully assisted and supported the Union by granting it an unlawful union-security clause.

equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization." H. Rep. No. 1147, 74th Cong., 1st Sess., 20. Because of this reasonably foreseeable consequence, the House Report later observed, "agreements more favorable to the majority than to the minority are impossible, for under section 8 (3) any discrimination is outlawed which tends to 'encourage or discourage membership in any labor organization'." *Id.* at 21. In this case the failure to grant the nonmembers the same retroactive payments given the union members disadvantaged at least one nonmember in the sum of $308.52 (Tr. 124, 127). This would seem to provide no small incentive to acquiring membership in the Union. It is therefore a fair conclusion, as the court below held in agreement with the Board, that "Discriminatory conduct, such as that practiced here, is inherently conducive to increased union membership. In this respect, there can be little doubt that it 'encourages' union membership, by increasing the number of workers who would like to join and/or their quantum of desire" (R. 124).

Petitioner does not dispute (Br. 32) "that where a 'necessary tendency' may be inferred from the underlying facts the Board is entitled, in the absence of evidence to the contrary, to make an ultimate finding without the necessity of actually

proving that a certain person or persons were actually encouraged." But petitioner asserts that it was denied the opportunity of introducing evidence which would nullify the inference of a union-encouraging tendency in this case. Petitioner at the hearing summarized what it sought to show as follows (R. 68):

> I know as a matter of fact that Mr. Loner [a nonmember who had filed the charge against petitioner] had for some time, and has for some time attempted to become a member of this union. I know that he has been unsuccessful in becoming a member of this union because of the restrictions of the union upon its membership. I therefore contend on behalf of Gaynor News Company that because of his overwhelming, his burning, his intense desire to become a member of this union that there was nothing we could do that would encourage him to membership because he was already trying to become a member of that union. And that is our case.

Relying upon this nonmember's already existing desire for membership and his ineligibility to acquire it, which we assume petitioner means is also the situation with respect to every other nonmember in its employ, petitioner contends that there is no basis for the inference that its discrimination had a union-encouraging tendency.

The first branch of petitioner's argument—that its discrimination was incapable of enhancing the previously acquired wish for membership—is pre-

mised on the assumption that it could show that each nonmember in its employ was already so saturated with a desire to join the Union that nothing petitioner did could increase it. The premise is fundamentally fallacious. What petitioner proposes to show is virtually impossible of proof within the limitations of an adversary system of litigation. How can it reliably be shown that each nonmember had reached that state of mind where the loss of three hundred dollars because of nonmembership in the Union would not further whet his desire to acquire the preferred status? How can it be shown that a dormant desire for membership has not been quickened to life by this additional evidence of its value? How can it be shown that each nonmember with his presumably different personality—some aggressive, some optimistic, some indifferent, some defeatist—has reached the same dead level of saturation or frustration so that all will be identically indifferent to this further stimulation?

It is for reasons like these that this Court has recognized that "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588. Unless one assumes that employees can reliably interpret the subtleties of their feeling, a gift calling " 'for a high degree of introspective perception' " (*Nation-*

al Labor Relations Board v. *Donnelly Garment Co.*, 330 U. S. 219, 231), their uncritical testimony concerning their special reactions to a particular stimulus is virtually worthless. Hence, the conclusion concerning the effect of proscribed conduct "must of necessity be based on the existence of conditions or circumstances * * * as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588. This test, used to determine whether conduct tends "to interfere with, restrain, and coerce employees" in violation of Section 8 (a) (1), should apply equally to determine whether discrimination tends "to encourage or discourage" union membership in violation of Section 8 (a) (3). By this test it is enough that the tendency is reasonably inferred; the actual reaction of the employees in a given situation need not, because it cannot, be demonstrated.[20]

[20] *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240, 244-245 (C. A. 7), certiorari denied, 320 U. S. 746; *National Labor Relations Board* v. *Ford Bros.*, 170 F. 2d 735, 738 (C. A. 6); *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 743-744 (C. A. D. C.), certiorari denied, 341 U. S. 914; *National Labor Relations Board* v. *Brezner Tanning Co.*, 141 F. 2d 62, 64 (C. A. 1); *National Labor Relations Board* v. *Engelhorn & Sons*, 134 F. 2d 553, 557 (C. A. 3); *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. 2d 951, 955-956 (C. A. 4); *Humble Oil & Refining Co.* v. *National Labor Relations Board*, 113 F. 2d 85, 92 (C. A. 5); *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7); *Elastic Stop Nut Co.* v.

In this case to give union members three hundred dollars more than nonmembers gives rise to a fair inference that nonmembers will be encouraged to acquire membership. To negative this inference petitioner must propose more than a psychological investigation incapable of reliable execution within the limitations of litigation.

Moreover, even if petitioner could negative the tendency of the discrimination to encourage nonmembers in its employ to acquire membership, petitioner has not even addressed itself to the influence exerted by the discrimination on the union members working for it. Certainly, as the Board found (R. 29), the preference accorded them by virtue of belonging to the Union would have the effect "of encouraging union employees to retain their union membership." Nor has petitioner addressed itself to the influence exerted on nonmembers in the industry not in its employ who, learning of the preferential treatment extended members, will be encouraged to join the Union in order to acquire the preferred status.

The second branch of petitioner's argument—that its discrimination was incapable of evoking a desire in nonmembers to join the Union because they were ineligible for membership—is basically inconsistent with the first branch of its argument.

National Labor Relations Board, 142 F. 2d 371, 377 (C. A. 8), certiorari denied, 323 U. S. 722.

If the nonmembers, as petitioner first argues, are filled with a desire to join the Union, then the closed character of the Union—their ineligibility to join it—does not nullify the encouragement of them to become members. The ineligibility of a nonmember to join presents an obstacle to be overcome in acquiring membership; the discrimination in favor of union members presents the incentive to try to overcome the obstacle and is therefore union-encouraging in tendency. By way of concrete illustration, nonmembers of the union involved in this case have already had repeated occasion to resort to legal action in an effort to secure membership,[21] and discrimination in wage payments such as that practiced by petitioner could well result in increasing such efforts to join the favored group. Moreover, the Board's own records reveal that the Union's membership lists are not as tightly closed as its rules indicate, for on more than one occasion the Union has offered to extend membership to non-union men in return for their cooperation. See *Newspaper & Mail Deliverers' Union*, 93 NLRB 419, 431, 433, 435, enforced, 192 F. 2d 654, 657 (C. A. 2). These illustrations give realistic point to the observation of the court below that the discrimination in favor of union members, obviously enhancing the attractiveness of union membership,

[21] See *Clark* v. *Curtis*, 297 N. Y. 1014, 80 N. E. 2d 536; *Ryan* v. *Simons*, 302 N. Y. 742, 98 N. E. 2d 707; cf. *Costaro* v. *Simons*, 302 N. Y. 318, 98 N. E. 2d 454; *Wilson* v. *Newspaper & Mail Deliverers' Union*, 123 N. J. Eq. 347, 197 Atl. 720.

might well lead to redoubled efforts by nonmembers to surmount the Union's restrictions on membership. As the court said (R. 124-125):

> It may well be that the union, for reasons of its own, does not want new members at the time of the employer's violations and will reject all applicants. But the fact remains that these rejected applicants have been, and will continue to be, "encouraged," by the discriminatory benefits, in their desire for membership. This backlog of desire may well, as the Board argues, result in action by non-members to "seek to break down membership barriers by any one of a number of steps, ranging from bribery to legal action." A union's internal politics are by no means static; changes in union entrance rules may come at any time. If and when the barriers are let down, among the new and now successful applicants will almost surely be large groups of workers previously "encouraged" by the employer's illegal discrimination. We do not believe that, if the union-encouraging effect of discriminatory treatment is not felt immediately, the employer must be allowed to escape altogether. If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the Act demands that the employer be deemed a violator.

It is clear, in short, that the discrimination in this case offends Section 8 (a) (3), for it is "of such a character as to have a natural tendency [to encourage] union membership." *General Motors*

Corp., 59 NLRB 1143, 1145, enforced with immaterial modification, 150 F. 2d 201 (C. A. 3).

D. *Properly found to violate Section 8(a)(3) of the amended Act, petitioner's discrimination was in any event equally violative of Section 8 (3) of the original Act*

Petitioner contends (Br. 35) that Section 8(a) (3) of the amended Act contains "a provision to cover the precise situation existing in the case at bar"—referring to the proviso which forbids discrimination under a union-security agreement where an employee is denied union membership on discriminatory grounds or on grounds other than non-payment of dues—and that this "impels one to the conclusion that the National Labor Relations Act of 1935 left open the situation here complained of." We have shown that Section 8(3) of the original Act prohibited the conduct in this case. The amendatory legislation, sharply curtailing the scope of a union-security agreement, was directed to other apprehended evils, and in the deliberations preceding adoption of the amendment Congress in no way intimated that the original Act did not reach this case. See pp. 16-26 of the Board's brief in *National Labor Relations Board* v. *International Brotherhood of Teamsters,* No. 301, this Term, and pp. 24-25 of the Board's brief in *Radio Officers' Union* v. *National Labor Relations Board,* No. 230, this Term. Indeed, if the position advanced by petitioner in this case is correct, its conduct is still outside

the statute's reach. As in Section 8(3) of the original Act, Section 8(a)(3) of the amended Act defines the basic offense to be to encourage or discourage union membership by discrimination in employment; the provisos which follow are immaterial qualifications unless the conduct first falls within the scope of the basic offense. If, as petitioner contends, its conduct does not encourage union membership, that would be true under the amended as under the original Act. Hence, to be meaningful, petitioner's concession of liability under the amended Act must be taken either as a concession of liability under the original Act as well or as a demonstration of the fallacy of the inference it seeks to draw from the amendments.

Petitioner's argument also presupposes, as it claims (Br. 8, n. 2), that the conduct in this case is governed by Section 8(3) of the original Act and not Section 8(a)(3) of the amended Act. The basis for the argument is that, while the retroactive wage and vacation benefits were paid after the amendments became effective on August 22, 1947, they were paid pursuant to a pre-amendment agreement, not "renewed or extended" subsequent to the amendments, and hence governed by the original Act as provided in Section 102. The argument cannot apply to the vacation benefits because these were not paid pursuant to any agreement (supra, pp. 5, 22-23), and it is doubtful whether it is valid as applied to the wage pay-

ments. The 1946 agreement, as extended before the amendments, was to expire on October 16, 1948 (*supra,* p. 4). On October 9, 1947, after the amendments, a supplement to the 1946 agreement was negotiated which provided for (1) an increase in wage rates, (2) the procedure to be followed in the negotiation of a sucessor agreement, and (3) in the event that the parties later negotiated a new contract, the payment of a three-month retroactive wage increase based on the rates set by the new contract (R. 101-102, 99). On October 25, 1948, a new agreement was reached for an additional term raising the wage scale and hence bringing into operation the retroactive wage payment condition specified in the post-amendment 1947 supplemental agreement (R. 91-94). These significant post-amendment changes raise a serious question whether they do not suffice to constitute a renewal or extension of the pre-amendment agreement within the meaning of Section 102. Compare *Broderick Co.,* 85 NLRB 708; *National Labor Relations Board* v. *United Hoisting Co.,* 198 F. 2d 465, 467-468 (C.A. 3), certiorari denied, 344 U. S. 914; *Katz* v. *National Labor Relations Board,* 196 F. 2d 411, 415-416 (C.A. 9). But the Board had no occasion to resolve this question in this case since petitioner was found to have effected discrimination encouraging union membership which was unlawful under Section 8(3) of the original Act as well as Section 8(a)(3) of the amended Act.

II

The General Counsel's complaint properly embraced all employees discriminated against by the retroactive wage and vacation payments

The charge initiating this proceeding was filed by Sheldon Loner, one of the non-union employees discriminated against when petitioner awarded retroactive wage and vacation payments. In the charge, Loner alleged that petitioner, by the refusal to pay him retroactive wages and vacation pay, had discriminated against him in violation of Section 8(a)(3) of the Act (R. 93-94). The complaint issued by the General Counsel after investigation of the charge[22] alleged that by the discriminatory wage and vacation payments petitioner had violated the Act with respect to all of its employees who were not members of the Union, including Loner (R. 99-100). The Board's order, enforced by the court below, directs back pay for Loner "and all other non-union employees, who were similarly situated" (R. 14). Petitioner contends that under the six-month period of limitations contained in Section 10(b) of the Act, the complaint and order are invalid insofar as they embrace any employees other than Loner.[23]

[22] The "charge" initiates an investigation which may or may not culminate in the issuance of a "complaint." See *National Labor Relations Board* v. *Dant & Russell*, 344 U. S. 375.

[23] The unfair labor practices occurred in November 1948 (retroactive wage payments) and January 1949 (vacation pay); the charge was filed on February 1, 1949, and served

Section 10(b) of the original Wagner Act provided that

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended * * * at any time prior to the issuance of an order based thereon.

Under this Section it was repeatedly held that the Board's complaint was not limited to the violations alleged in the charge, but could embrace other violations uncovered by the Board in the course of investigating the charge. See, *e.g., Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 225, 238; *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. 2d 38, 42-43 (C. A. 6); *National Labor Relations Board* v. *American Creosoting Co.,* 139 F. 2d 193, 195 (C. A. 6), certiorari denied, 321 U. S. 797; *Killifer Mfg. Corp.,* 22 NLRB 484, 488. As this Court observed, the charge "merely sets in motion the ma-

on petitioner on February 3, 1949; the complaint issued June 13, 1950 (R. 77-78, 83-84, 93-94, 97-101). Congress expressly declined to place a time limitation upon the issuance of complaints. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 53.

chinery of an inquiry. * * * [It] does not even serve the purpose of a pleading." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18. Under the original Act, therefore, if an individual filed a charge alleging discrimination against himself, the Board was unquestionably authorized to issue a complaint alleging discrimination against the charging party and other employees who were the victims of the identical discrimination.

Petitioner argues, however (Br. 40-42), that the limitations proviso added to Section 10(b) by the Taft-Hartley Act curtailed the General Counsel's Power in this respect.[24] The proviso, inserted at the end of the first sentence of Section 10(b), states that

> no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge * * *.

Petitioner contends that this proviso precludes the General Counsel from alleging that the conduct described in the charge discriminated against other employees as well as the charging party. We show below, as the Board has fully explained in *Cathey Lumber Company*, 86 NLRB 157, (1) that this contention, rejected by the court below (R. 153-155) and by several other courts of appeals,[24a] is

[24] Section 3(d) of the amended Act vests the General Counsel with final authority, on behalf of the Board, in respect of the issuance of unfair labor practice complaints.

[24a] *National Labor Relations Board* v. *Kobritz*, 193 F. 2d. 8,

inconsistent with the general statutory scheme which places upon the Board, rather than on private individuals, primary responsibility for the protection of the public rights created by the Act, and (2) that it is without support in either the language or the purpose of the limitations proviso.

1. As noted above, it was recognized that under the original Act the charge was not required to particularize all the acts and conduct later alleged in the complaint as violations of the Act; *a fortiori,* under the original Act a charge which specified the unfair labor practices did not have to list the names of the employees discriminated against by the unlawful conduct. In amending the Act, Con-

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14-16 (C. A. 1); *National Labor Relations Board* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C. A. 3); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 903 (C. A. 3); *National Labor Relations Board* v. *Epstein*, (C. A. 3) decided April 15, 1953; *National Labor Relations Board* v. *Westex Boot & Shoe Co.*, 190 F. 2d 12, 13 (C. A. 5); *Stokely Foods, Inc.* v. *National Labor Relations Board*, 193 F. 2d 736, 737 (C. A. 5); *Cathey Lumber Co.* v. *National Labor Relations Board*, 185 F. 2d 1021 (C. A. 5), enforcing 86 NLRB 157, 162, vacated on other grounds, 189 F. 2d 428; *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C. A. 7); *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10).

The sole decision to the contrary is *Joanna Cotton Mills* v. *National Labor Relations Board*, 176 F. 2d 749, 754 (C. A. 4), where after setting aside the Board's order on substantive grounds, the court also noted that the amended charge alleged violation of a different section of the Act and hence "brought into the case a new and entirely different charge of unfair labor practice from that contained in the original charge." In the instant case both the charge and the complaint alleged violation of the same provisions in the same manner.

gress provided in Section 10(b) that charges be filed and served within six months of the unfair labor practices alleged. However, Congress did not otherwise alter the requirements of a charge, and, contrary to petitioner's contention, Congress nowhere provided that charges under the amended Act need be any more specific or exhaustive than those under the original Act. Indeed, every reason which prompted the courts to hold that charges under the original Act need not detail the unfair practices alleged applies with equal force under the amended Act. As before, so now, "Anyone can file a charge. Many are filed by private citizens unskilled in the law or art of pleading." *Kansas Milling Co.* v. *National Labor Relations Board,* 185 F. 2d 413, 415 (C. A. 10). To assume that the charge fixes the scope of the ensuing inquiry, therefore, is to suppose that Congress removed this vital aspect of enforcement from the expert agency charged with administering the Act and delegated it to any layman who might file a charge.

Furthermore, to require a charging party to particularize each and every act constituting an unfair labor practice would place upon him the burden and expense of investigating and determining the full nature and scope of the employer's or the union's misconduct. But Congress rested the responsibility of investigating such details with the Board, a public agency vested by statute

with the necessary investigatory machinery. Moreover, to require the details of the unfair labor practices to be specified in the charge would place upon the charging party the responsibility of framing the issues in the case, a matter which Congress left to the General Counsel in the complaint. *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C. A. 5); *Consumers Power Company* v. *National Labor Relations Board*, 113 F. 2d 38, 42 (C. A. 6); *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415-416 (C. A. 10).

If, as petitioner contends, the charge must set forth the precise nature and extent of all claimed violations, a function traditionally served by the complaint, then the failure of the charging party to allege certain violations would preclude their development by the General Counsel—a situation hardly consistent with the statutory scheme that the Board proceeds, not in vindication of private rights, but as an administrative agency charged by Congress with the function of enforcing the Act and bringing about compliance with its provisions. See *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362, and authorities there cited; see also *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 687. Nothing in the amended Act suggests that Congress intended any such drastic departure from the basic concept that the Board, once its

jurisdiction is invoked, acts in the public interest, and is not limited by the contentions of the charging party. On the contrary, the amended Act retains the provisions of the original Act which give the Board broad investigatory power (Section 11) and also retains the provision which permits the Board to amend its complaint at any time prior to the issuance of an order based thereon (Section 10(b)). The significance of these provisions would be seriously curtailed if the General Counsel or the Board were restricted to the violations particularized in a charge.

The circumstances of this case illustrate the importance of these considerations in the administration of the Act. The charge filed by Loner alleged discrimination as to himself. Loner apparently had no interest in alleging that others also were discriminated against by petitioner's practices. But the General Counsel on investigating Loner's charge necessarily discovered that the very gravamen of the case was not discrimination against Loner as an individual but was discrimination against all non-members of the Union. Accordingly, the General Counsel in his complaint recited the precise unlawful conduct charged by Loner—discriminatory wage and vacation payments—and alleged that this conduct discriminated against Loner and all other non-union employees.

The contention that the amended Act added a requirement that charges specify all violations

thereafter to be litigated attributes to Congress a desire fundamentally to alter the purpose hitherto served by a charge and indeed to alter the whole concept of the Board's role. But nothing in the legislative history suggests that Congress intended so to revolutionize the function of the charge. We think it clear that Congress, apart from intending that prompt notice of a pending investigation be furnished the prospective respondent, did not otherwise change the function of the charge, and approved the previous administrative construction, as affirmed by the courts. Cf. *National Labor Relations Board* v. *Gullett Gin Co.,* 340 U. S. 361, 365-366; *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110, 114-115; *Brewster* v. *Gage,* 280 U. S. 327, 337.

The amended Act, in requiring filing and service of a charge within six months of the commission of unfair labor practices, has added a new and important procedural safeguard in unfair labor practice cases. Service apprises a respondent of the pendency of a charge; it thereby informs him that an investigation may be instituted to determine whether during the preceding six-month period he has committed unfair labor practices, and that a complaint may issue alleging the infractions uncovered. The six-month limitation period thus provides freedom from liability for unfair practices committed before that time, and it thereby performs the usual function

of a statute of limitations, namely, to provide a cut-off date after which answerability for an infraction is no longer exacted.[25]

This view of the charge is consistent with the pattern of the statute. It recognizes the respective roles which the charge and the complaint play in the statutory scheme, a role which each has satisfactorily played for over 15 years. It affords the safeguards Congress intended without stripping the Board, as petitioner's argument would strip it, of the essential power to investigate and remedy unfair practices committed within the limitations period. Cf. *National Labor Relations Board* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506 (C. A. 5) ("* * * the statute is a statute of limitations and not of jurisdiction * * * ").

The considerations outlined above have moved the Courts of Appeals for the First, Third, Fifth, Seventh, and Tenth Circuits, as well as the court below, to reject assertions of invalidity or want of specificity in a charge, similar to the contentions advanced here. See cases cited *supra*, p. 46, n. 24. As the Third Circuit stated in the *Kingston Cake* case, *supra*, 191 F. 2d at 567 (quoted

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[25] See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 53; S. Rep. No. 105, 80th Cong., 1st Sess., p. 26; H. Rep. No. 245, 80th Cong., 1st Sess., p. 40; *National Labor Relations Board* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504 (C. A. 5).

with approval by the First Circuit in the *Kobritz* case, *supra,* 193 F. 2d at 15-16—

> it would hardly be consistent with the general investigatory nature of the action on the charge to confine the subsequent complaint to its allegations.

See also the *Bradley Washfountain* case, *supra,* 192 F. 2d at 149, where the court observed: "It is without significance that the complaint was broader than the original charge."

2. It remains true, then, under the amended Act, that the entire statutory scheme shows that the General Counsel's complaint is not confined to the allegations of the charge. And it is clear that the literal language of the six-month limitations proviso does not support petitioner's contrary contention. The proviso prohibits only the issuance of a complaint based upon *"any* unfair labor practice occurring more than six months prior to the filing of the charge." (Emphasis supplied.) If there is any language in Section 10(b) which suggests that the complaint is limited to the allegations of the charge, it is to be found in the opening sentence which provides that "Whenever it is charged that any person has engaged in * * * any * * * unfair labor practice, the Board * * * shall have power to issue * * * a complaint *stating the charges in that respect* * * * " (emphasis supplied). But this language was left unchanged from the orig-

inal Act, under which it had long been settled that the Board had power to allege in its complaint violations not specifically alleged in the charge.

In the present case, at least, it is clear that the purpose of the six-month limitations proviso has been fully served. The conduct alleged in the complaint with respect to all non-union employees was identical with the conduct alleged in the original charge with respect to Loner alone; hence, petitioner was called upon to defend only the action which formed the basis of the original charge. In preparing to respond to this charge, petitioner necessarily preserved the same evidence that it would have preserved had the original charge named all of the employees involved in the single discriminatory act. Thus, every purpose of a statute of limitations was satisfied by the charge in this case. See *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 348-349; *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 314.

Petitioner cannot claim hardship or surprise prejudicial to an adequate opportunity to prepare a suitable defense. Petitioner points to no relevant evidence it could have adduced had it been served with a more detailed charge rather than with a fully particularized complaint. In these circumstances it cannot be said that petitioner's rights were prejudiced by any lack of notice by the inclusion in the complaint of em-

ployees whose situation was identical with that of the employee who filed the charge. Cf. *Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board,* 111 F. 2d 869, 873 (C. A. 7); *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. 2d 38, 42 (C. A. 6).[26]

It follows that the General Counsel in his complaint properly alleged that the conduct specified by Loner in the charge violated the Act, not only with respect to Loner, but with respect to the other employees similarly situated.[27]

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[26] The non-union employees, other than Loner, have not been identified, but they are readily identifiable (R. 85-86). In any subsequent proceedings fixing the amounts due the discriminatees (cf. *National Labor Relations Board* v. *Bird Machine Co.,* 174 F. 2d 404, 405-406 (C. A. 1)), the burden of proving that a particular individual was in fact "similarly situated" to Loner will, of course, rest with the General Counsel.

Petitioner's contention (Br. 41-42) that the lack of a charge on behalf of the other employees "similarly situated" and the failure of the complaint to name these employees precluded it from adducing the testimony of these individuals as to whether each of them had been encouraged to join the Union is merely another facet of its basic contention, discussed above, pp. 33-41, that independent proof of encouragement must be adduced to establish a violation of Section 8 (a) (3).

[27] In its Summary of Argument (Br. 9), but not in the Argument itself, petitioner asserts that the amended charge, filed in June 1950, was untimely insofar as it alleged illegality of the union-security clause in the October, 1948 contract and that, therefore, the court below erred in holding that the complaint based upon this allegation was valid. Petitioner did not raise the issue in its petition for certiorari and the question is not properly before this Court. See n. 1 p. 2, *supra.* In any event, the propriety of the ruling of the court below is clear. The 1948 contract was still in effect when the amended

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

BERNARD DUNAU,

FREDERICK U. REEL,
Attorneys,
National Labor Relations Board.

April, 1953.

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charge was filed and, as the court below observed (R. 123), "* * * so long as that contract continued in force, if actually illegal, a continuing offense was being committed by the employer. Since the contract was still in force at the time of filing, the six months' limitation period of § 10 (b) had not even begun to operate." Accord: *Superior Engraving Co.* v. *National Labor Relations Board,* 183 F. 2d 783, 790-791 (C. A. 7), certiorari denied, 340 U. S. 930; *National Labor Relations Board* v. *United Hoisting Co., Inc.,* 198 F. 2d 465, 468-469 (C. A. 3), certiorari denied, 344 U. S. 914; *Katz* v. *National Labor Relations Board,* 196 F. 2d 411, 415 (C. A. 9).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.)*, are as follows:

* * *

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10.

* * *

(b) Whenever it is charged that an yperson has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his dis-

charge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. * * *

The relevant provisions of the National Labor Relations Act prior to amendment (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C. 151 *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 8. It shall be an unfair labor practice for an employer—

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or

condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such un-

fair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

1. The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. * * *

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